SUPREME COURT, U.S.
FILED

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

Gary Monte Spring,
Pro se

v.

David M. Sandhaus,
Respondent

On Petition For Writ of Certiorari
Supreme Court of the State of Washington
Olympia, Washington

PETITION FOR WRIT OF CERTIORARI

Gary Monte Spring, Pro Se

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27 pp

PREFACE TO QUESTIONS

On March 8, 1993, my fiancee Marilyn McKinney and myself, Gary M. Spring, were returning home from a vacation in Montana on Interstate 90 through Look Out Pass, an extremely dangerous and curvy two-lane highway. We were terrorized for some ten miles by one Helmuth Fichtler, driving a red Toyota, and were finally forced off the road into oncoming traffic - just missing a cement center divider. The incident was reported to the State Patrol - they let the man go even after they heard our story and that we wanted to press charges.

I encountered this man again in Ritzville, Washington, where I made a Citizen's Arrest and the police were called. The police put out a false 9-1-1 call which was called in as shots in progress. I was interrogated by the police without Miranda and my vehicle was illegally searched (although the police claim I gave them permission, which I tell you I did not). My constitutional rights were denied me. There had been a real cover- up in this case from beginning to end. I guess it's what is referred to as behind the blue veil, in particular with a lot of information recently coming out on cases in eastern Washington.

QUESTIONS:

Why can't a private citizen arrest another person for a public offense presumably a felony committed in his presence and against such a person?

Why can't a private citizen protect himself or another from an accomplice to a crime when said person advances in a threatening manner?

Why can't a totally disabled veteran, service trained, protect himself by any means possible when imminent danger arises?

Why can't a disabled veteran call for police assistance with the assurance the police will not arrest the wrong person before sorting out all the details?

Why did the Court of Appeals refuse to accept my video tapes which speak for themselves, and are part of the original record of the proceedings? Judge Miller who presided at my trial in Ritzville, Washington, gave me his permission for the trial to be video taped and is actually viewed on the tape doing so.

Why did the Court of Appeals deny all of my motions to have the video tapes used on behalf of my defense under new evidence?

Why did the Court of Appeals turn down my motion for an extension in time due to an emergency double hernia surgery for which I called the court to reschedule before I was to appear in person before a three-judge panel?

Why was I interrogated by the police without Miranda and why was my vehicle searched without my permission?

Why did the court reporter, Julie K. Hedrick, CSR, issue a notarized certificate declaring that the transcript of my trial was complete? How can this be so when the 9-1-1 tape which was played in court was never transcribed into her notes verbatim as part of the transcript? Why have the lower courts refused to accept this as fact?

Will the Supreme Court of the United States allow a small town court to:

Tamper with a jury by rigging, fixing and intimidating this same jury by a show of force allowing seven fully armed police with a three foot stun gun to be present to ensure that the jury bring in a guilty verdict? Why do you suppose they were there? For what purpose did the prosecution really have them present? Why were they not covering the exits if there was concern for my escape?

Can this same court be allowed to tamper with the transcript and the 9-1-1 recordings?

Can they be allowed to tamper with one of their own officer's testimony?

Can they be allowed to cover up their own false arrest of me by their officer D.W. Dale, without warrant (Miranda) or probable cause - just a false and dangerous 9-1-1 call put out to officers as a gunfight in progress?

Finally, I ask the Supreme Court, why would anyone being of sound mind and judgment, stop a state patrol officer to report a crime such as this one, for attempted vehicular homicide, on Interstate 90 in Montana, if they didn't feel they were the victim not the perpetrator?

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Statement of Jurisdiction

Order filed by the Supreme Court of the State of Washington September 3, 1997, has brought me to appeal to the Supreme Court of the United States.

28 USC 125

THE SUPREME COURT OF THE
STATE OF WASHINGTON

Filed September 3, 1997

No. 65440-9

ORDER

C/A No. 13707-4-III

STATE of WASHINGTON,
Respondent

v.

Gary Monte Spring,
Petitioner

All five members of Department II of the Court considered the matters set on its September 2, 1997, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied. The motion to accept video tapes as part of the record is denied.

I CERTIFY THAT THIS ORDER WAS
ENTERED BY THE COURT ON THIS
3rd DAY OF SEPTEMBER, 1997.

"S/_____"
C.J. Merritt, Clerk

I CERTIFY THAT THIS ORDER WAS
ENTERED BY THE COURT ON THIS
3RD DAY OF SEPTEMBER, 1997
"S/_____"
C.J. Merritt, Clerk

filed
Supreme Court
State of Washington
97 Sep-3pm 1:06
by C.J. Merritt, Clerk

Text of the Petition

On Monday, March 8, 1993, at approximately 10:30 A.M., my fiancee and I were returning from a wonderful vacation in Montana. Starting up Look Out Pass in the right lane doing approximately 60 m.p.h. behind a semi-truck. The driver of the truck suddenly slowed as we pulled out and attempted to pass in the left lane. As we approached the front of the truck, a red Toyota which was on the truck's right front fender forced him to slow. As we tried to pass this car he cut us off just about hitting our right front fender. The red Toyota proceeded to use the truck and his car to block our passing. We followed at a safe distance. Without going into all the lengthy details, the red car continued to terrorize us for another ten miles. As I was finally able to pass in the left lane, this driver pulled over to our right front fender and I looked over at him at this point. He forced us through a cement center lane and into oncoming traffic on a curve. I accelerated with little or no room just missed the guard rail and the left front fender of the red Toyota. We looked in the rear view mirror noticing both driver and passenger seated in front of the red Toyota laughing at us. I proceeded up the pass and down the other side into Idaho, stopping behind a State Patrol car to tell the officer what happened He pulled over the Toyota and let him go, even after we told him we wanted to press charges for attempted vehicular homicide. This all happened on Interstate 90. The Patrol Officer told both of us to stay away from each other as he found out we were traveling in the same direction. We passed the same car again in Spokane, Washington, where again he had seven cars backed up behind him in the passing lane. He finally moved right letting all of us pass. We pulled into Jake's Cafe in Ritzville, Washington, to have lunch. When we were just finishing our lunch I saw a man walk by and I told my fiancee that was the man who tried to kill us. We waited for him to leave. The driver went to his car and was backing out slow. I walked over to the driver's door, knelt down and asked the driver why he tried to kill us in Montana. The man stopped his car, pushed open his door, exiting his car, almost pushing me over. Walked away, stopped, turned around and confronted me sticking his finger in my face. He proceeded to tell me that I was crazy and that it was our word against his and began to shake his right finger in my face just short of hitting me in the left eye. At this point, I reached out and grabbed his right arm to protect myself. He pulled away at this point, I told him he was being placed under Citizen's Arrest. He resisted and at that point I told him we were going to the State Patrol. Now a crowd began to gather in front of the restaurant. At this time his passenger exited the passenger side of the

car coming around the front side of the Toyota. He was approaching Marilyn and myself, pushing up his sleeves as one would do if they were going to fight someone. He told me that they were going no where with me. Marilyn was to my right and this man approached us as if to fight to the death. I quickly had to make a decision and I knew being totally disabled with Asbestosis I could not protect Marilyn in the onslaught. I stepped back and pulled out a .22 pistol out of my right front pocket. Note: it was wrapped in a cellophane bag. There was no intent, no premeditation to actually use the gun. I tore the bag off the pistol and stepped forward and told this man he was under Citizen's Arrest and directed to the crowd of people to call 9-1-1, call the police. I repeated this statement several more times. The man immediately stopped in his tracks and moved back against the cafe window. I put the pistol back in my front pocket as the Washington State Patrol drove up along with four more police cars all arriving on the scene with their guns drawn. I pulled out my driver's license and gun permit. As I approached the officer, he had "no probable cause" but forced me to the ground after I had told him that this man had tried to kill us in Montana and that I made a Citizen's Arrest.[1,2] The officer forced me to the ground and hand cuffed me and took me off to jail. After reading my fiancee's statement and mine which were identical, they let me go with a summons and told me they would contact me at a later date. No Miranda was read to either my fiancee or

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[1] There was "no probable cause" when the officers arrived on the scene. There was no gunfight, no weapon present, nothing in sight. At that time, my pistol was put away in my right front pants pocket. I was holding my identification in my hands - my driver's license, gun permit and Shriner's Card. Mere suspicion or belief unsupported by facts or circumstances is insufficient.
State v. Jones, 248 Or. 428-435 p.2d 317, 319

[2] Citizen's Arrest. A private citizen as contrasted with a police officer may under certain circumstances make an arrest generally for a felony or misdemeanor amounting to a breach of the peace. A private person may arrest another. 1: For a public offense committed or attempted in his presence. When the person arrested has committed a felony, although not in his presence 3. When a felony, in fact has been committed and he has reasonable cause for believing the person arrested to have committed it.
Calif. Penal Code §837

myself until we were at the police station, yet they interrogated us and searched my car for another weapon.[3]

What occurred after the police melee is somewhat devastating and to think what can happen to a disabled veteran of the United States of America when the police can make a huge mistake and can cover it up behind the blue veil. A deputy named Glenn Ball, who was the very same deputy who took Marilyn's purse without her consent and searched it, then asked for permission, after the fact, was the very same person who told Marilyn McKinney my witness, my fiancee, that he would sort things out further and come back and talk with her. Upon doing so, he found out that 9-1-1 call was put out wrong as SHOTS IN PROGRESS. He admitted this to Marilyn and apologized for the trouble it caused and told her that the whole thing was turning into a three ring circus. He further stated to Marilyn that we should all go down to the police station and sort things out further. During the actual trial, Marilyn was conveniently removed from the courtroom when this officer, Glen Ball, was called to give his testimony.

Sometime later, the police made yet another mistake. They arrested me at my home in Seattle for Flight to Avoid Prosecution as a fleeing felon. Marilyn had to post a $2,500.00 bail for a $25,000.00 bond for which she had to draw money from her IRA under penalty, and also for which she was never compensated even after the police admitted that the clerk had the address wrong on their records.

My constitutional rights have been violated over and over again through out this case.[4]

I was falsely arrested with no probable cause when I asked police for assistance. I was later tried and convicted of 2nd degree Assault.

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[3] Miranda Rule: Prior to any custodial interrogation (that is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way) the person must be warned: 1. That he has the right to remain silent 2. That any statement he does make may be taken down and used as evidence against him. 3. He has the right to the presence of an attorney. That if he cannot afford an attorney, one will be appointed for him prior any questioning if he so desires.

Unless and until these warnings or a waiver of these rights are demonstrated at the trial, no evidence obtained in the interrogation may be used against the accused. Miranda v Arizona, 384 U.S. 436, 444, 478, 479 86 S. Ct 1062, 1612, 1630, 16 L.Ed.2d 694

[4] Rap 13.4 (b) 3rd Consideration

A petition for review will be accepted by the Supreme Court only: if a significant question of law under the Constitution of the State of Washington or of the United States is involved. Washington Appellate Practice Deskbook, Vol. II., pg28-4

When I presented my papers to the Court of Appeals, Division III, State of Washington, they refused to accept my video tapes which were sanctioned to be made of the entire trial by the presiding Judge Richard Miller. These tapes should have been accepted for they are part of the original record of proceedings. Just prior to my appearing before a three judge panel at the Court of Appeals, I required emergency surgery for a double hernia which was already protruding through my left groin. I called the Court to advise them of my surgery before the meeting and also sent a motion to grant me an extension which would allow me to recuperate so that I could travel to Spokane at a later date.

The Court of Appeals turned down my motion and did not give a written ruling by a commissioner stating a reason why they refused to reschedule my hearing.[5]

They took away my constitutional right to see, hear and be heard. Logically there was absolutely no fairness on my behalf to their way of thinking except to prevent me from appearing in person and having the right to be heard, and putting my back to the wall. There was nothing more significant than my interrogation by the police without Miranda, the illegal search of my vehicle, the denial of my motion for an extension in time to allow me to appear before a three judge panel to hear and be heard, the denial of the fact that the videotape are part of the record of proceedings and should have been accepted by the Court of Appeals.[6,7]

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[5] § 21.09 Decision:

A commissioner decides a motion by a written ruling RAP 17.6 (a) A ruling granting a motion on the merits should be concise, but it should include a description of the facts sufficient to place the issues in context, a statement of the issue, and a resolution of the issues with supporting reasons. Rap 18.14(h). 18.14(g) provides that a decision denying a motion on the merits is governed by Rap 17.6, which requires a written ruling containing a statement of reasons.

Washington Appellate Practice Deskbook, Vol. II., pg21-8

[6] The term "records" means accounts, correspondence, memorandums, TAPES, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

Securities Exchange Act of 1934, § 3.

[7] Court Record of Proceedings. The official collection of all the trial pleadings, exhibits, orders and word-for-word testimony that took place during the trial. The "record" includes pleadings, the process, the verdict, the judgment and such other matters as by some statutory or other recognized method have been made a part of it.

C. J. Tower & Sons of Buffalo, Inc. v. U.S. Custom Ct. 347 F Supp. 1388, 1389.

I am stating to the U. S. Supreme Court, under the newly discovered evidence rule, I submitted three motions to the Court that I would not receive a fair trial in Ritzville, Washington. These motions are verified by affidavits.[8]

To prove this is a true statement I submit to the Court videotapes that are indisputable documented proof that I did not receive a fair trial.

I have repeatedly been denied the acceptance of these video tapes which are undisputed evidence of the truth and facts in this appeal.

Due process standards of fairness, and justice rights of citizens against government actions that threaten the denial of liberty.

In summation, justice has truly not been served in this case. From early on in this case I was guilty until proven innocent! While the two perpetrators have been enjoying their lives, my fiancee Marilyn (now my wife) and I have gone through the past five years, suffering mental, physical and financial damages. I was set up early on in this case and made "an example" of in this small town, where if you spit on the street, it's considered a crime!

The only true justice in this case is a complete reversal of the decision. This case was allowed to get off the ground surrounding a false and fraudulent 9-1-1 call and from thereon out, a complete cover-up was made by the Ritzville Police Department and the Adams County prosecutor, Dennis Morgan. They decided to bury me! The only thing I did wrong, was to represent myself pro-se, which if I had a chance to do over, I would retain an attorney from the start.

The fact is on receipt of the Court of Appeals denial of my first motion to grant a two-month extension in time due to emergency surgery, I immediately sent out another motion for reconsideration for a two-month delay for this medical emergency surgery for which I enclosed papers from the VA Hospital in Seattle. This motion was dated February 28, 1997. Why was this motion denied? I had the right to appear before a three-judge panel. I got a call (instead of a reply by mail to this motion) from the clerk/staff attorney, at the court of appeals, Patrical Crandall, stating she had called the VA Hospital and that no such surgery was scheduled. It turned out she called the wrong department. She was given the correct number and department and said she believed me and that she would not have to call the VA Hospital back after all. She further informed me that I had put a whole lot of people out. That is, if I didn't show up for the scheduled panel hearing, originally scheduled on March 4,

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[8] U. S. v. DePugh, D.C. Mo., 266 F. Supp. 417, 434.

1997, since I would then create an imposition for these same judges to re-prepare for this hearing. She mentioned that then they would have to do it in Yakima, Washington. Finally, after talking further, Yakima was out of the question, too. She then told me we would have to do this on the phone as a teleconference. I told her this would not be agreeable with me as it was my right to be present (physically present) and that this certainly was not something that I had any control over in the first place. She got very belligerent and hung up the phone on me! This was yet another violation of my rights.

Now let us review the Miranda rule. Neither me or my fiancee, at that time, were read MIRANDA before interrogation. I was arrested without DUE PROCESS OF LAW - NO PROBABLE CAUSE. The incident occurred approximately 13:20 hours. I was not read any Miranda until 14:00 hours, later at the police station. "AFTER THE FACT" from 13:19 to 13:30 (this can be verified on the police report) I would have had to be a magician to sign anything at that time as I was handcuffed and the chain was rolled up behind my back with my hands in a crossed position. At the time officer D. W. Dale held me at gunpoint, there was no gun in sight, no visible evidence of a gunfight, NO PROBABLE CAUSE. Another violation of my rights. Also with regard to "no probable cause" "no gun in sight", officer Glen Ball gives testimony to this fact in court that there was no gun in sight.

Change of venue - the prosecutor in Ritzville, Dennis Morgan claimed the court never released any information to the news media. There were statements released and made by officer McKenzie in a front page article of their local newspaper with my face spread over the front page, the article being on my arrest. This did, in fact, prejudice people in this small farming community. Another violation of my rights.

Video tapes - Since the inception of videotapes and recorders at trials, a precedent has been set and accepted as factual and true, uncontested by law. Rodney King and O.J. Simpson trials are two of the proven accepted examples of this new medium or acknowledgement of real and proven facts caught on tape and recorded forever. Now excerpts are film clips of actual happenings in this proven and lawful deliverance of said film clips - a true and concise interpretation of actual happenings in the court of Ritzville as shown on August 17th and 18th, 1993, case no. 93-1-0004-8, State of Washington vs. Gary Monte Spring. My attorney, Anthony Savage, was present during my sentencing and can give verification that the judge again asked me if I was videotaping for the record. To which I replied yes. The Court of Appeals and the Supreme

Court of the State of Washington erred in their rejection of these court-sanctioned tapes which were and are part of the "record of proceedings" and which they sent back as inadmissible evidence. Now I ask the court, does this leave any room for doubt in one's mind in raising the question as to a constitutional violation of my rights.

False/fraudulent 9-1-1 call - DIRECT ATTACK AND DIRECT EVIDENCE - The existence and deliverance of the 9-1-1 tape to the Supreme Court of the State of Washington. This tape was used in court as evidence in this case which has been suppressed by deputy prosecutor Gail Petrusic in Ritzville. "Under DISCOVERY", this violates federal law. Another violation of my rights.

I tried to address the issue of my false arrest in Judge Miller's court. He simply had the jury removed from the courtroom. The court erred in their record keeping, having me at the wrong address. I have a dual address and they simply sent an officer to the wrong address and thought I had flown the coop. I was arrested in Seattle as a fleeing felon! This cost my fiancee $2,500.00 for which she was penalized since the money was drawn from her IRA. She was never compensated for their error.

Regarding jury tampering, friends, relatives of the court and neighbors in work-related fields - one Robert Blair, Adams County clerk and his wife Marlys Blair, (1st juror) appears on the returned check to Marilyn McKinney when her money was refunded to her. Also, juror Velda Miller's name appears on the same check. She is related to Judge Miller who presided over my trial in Ritzville, Washington. Another violation of my rights!

Another issue of law I questioned. Officer McKenzie was a chief witness for the prosecution, yet was allowed to be seated up front with the prosecutor, Dennis Morgan, throughout the entire trial. This can be witnessed on videotape. I believe this is another violation of my rights.

My citizen's arrest was interfered with due to a false and fraudulent 9-1-1 call. Another violation of my rights. I am a 100% disabled veteran. Indisputable evidence - acting on my own behalf, looking through my eyes and seeing the fear in Marilyn's eyes of impending danger from the man Charles Burley who was exiting the red Toyota and coming towards us (rolling up his sleeves as one would in a fist-fight). I knew being disabled, I could not physically defend her from him.

Hearsay - when the cook, Brian Stedman, called in to the 9-1-1 dispatcher, Christine Beeler and said: "we need an officer here at Jake's."

When the 9-1-1 dispatcher called it out to the police in the field as gunfight in progress, it became double hearsay. It was no wonder the police (all six squad cars) arrived on the scene with guns drawn expecting some sort of a melee. When, in fact, there was no gun in sight, no probable cause, no shots fired!

Justice has truly not been served. There is no looking the other way here. A very significant constitutional law question is raised here in this case where the court of appeals and the supreme court of the State of Washington have both denied me my rights when my court-sanctioned videotapes were sent back as inadmissible evidence. All one has to do is to view these tapes and you can witness the signaling and tampering, among other legal discrepancies which take place. And, who has been responsible for these 2 lower court rulings to deny acceptance of these video tapes.

There can be no claim of assault when a person makes a citizen's arrest for a felony that has been perpetrated against him.

I am asking the U.S. Supreme Court to dismiss the charges against me in lieu of the fact that I am an innocent man, 100% disabled veteran, who made a Citizen's Arrest and simply tried to protect his civil rights at a time of great peril!

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY MONTE SPRING,

Appellant

No. 13707-4-III

Division Three
Panel Eight

UNPUBLISHED
OPINION

FILED Apr 3, 1997

BROWN, J. - Gary Monte Spring was convicted of one count of second degree assault. He appeals pro se, assigning numerous errors including: violation of his Fourth Amendment rights; prosecution for a crime other than the one for which he was arrested; denial of his motion for change of venue; right to be tried by an impartial jury; improper denial of his motion for recusal; subornation of perjury; prompting a witness to deny making an earlier statement; playing a 911 recording; improper exclusion of evidence of Mr. Spring's character; and police interrogation without advisement of Miranda warnings.[1] We affirm.

FACTS

On March 8, 1993. Mr. Spring and his fiancee Marilyn McKinney were traveling west on Interstate 90 in Montana. Helmuth Fichtler and Charles Burley were also traveling the same direction on I-90. These two vehicles encountered one another shortly before Lookout Pass, on the border between Montana and Idaho. Mr. Spring and Ms. McKinney contend that Mr. Fichtler tried to run them off the road. Mr. Fichtler and Mr. Burley contend that Mr. Spring passed them at a high rate of speed using the median to maneuver around them.

Once Mr. Spring had passed Mr. Fichtler, he continued traveling west on I-90 into Idaho when he saw an Idaho State Trooper engaged in a

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

routine traffic stop. Mr. Spring pulled over and told Trooper Christopher Schenck about the incident with Mr. Fichtler. As Mr. Spring was speaking with Trooper Schenck, he identified Mr. Fichtler and Mr. Burley as they passed. Trooper Schenck followed Mr. Fichtler and Mr. Burley and after five miles stopped them. Mr. Spring followed and pulled behind Trooper Schenck's vehicle. Trooper Schenck spoke with Mr. Fichtler and Mr. Burley. They told the Trooper that Mr. Spring was the reckless driver. Both Mr. Spring and Mr. Fichtler wanted to file complaints against each other. Trooper Schenck did not arrest either party or issue any citations because the incident occurred in Montana. However, he filled out cards for each driver containing the other driver's name, address, and type of vehicle and gave both of them the Montana Highway Patrol's phone number. Mr. Fichtler and Mr. Burley left the traffic stop and continued west on I-90. Mr. Spring left the traffic stop a few minutes later.

Mr. Fichtler and Mr. Burley stopped at Jake's Cafe in Ritzville. Apparently, by coincidence, Mr. Spring and Ms. McKinney also decided to stop at Jake's. After eating dinner, Mr. Fichtler and Mr. Burley exited Jake's and, while entering Mr. Fichtler's car, were approached by Mr. Spring. Mr. Spring went to the driver's side of the vehicle and accused Mr. Fichtler of trying to kill him and his fiancee by running them off the highway. Mr. Spring then grabbed Mr. Fichtler's arm and pulled him from the car. He claimed to be placing Mr. Fichtler under citizen's arrest. Mr. Burley exited Mr. Fichtler's car and walked to the front of the car where Ms. McKinney was standing, which was four feet from Mr. Fichtler and Mr. Spring. Mr. Spring pulled out a gun and pointed it at Mr. Fichtler. Mr. Fichtler and Mr. Burley testified that Mr. Spring said that if Mr. Fichtler tried to get away he would shoot him.

A chef at Jake's called 911. Several police officers responded to the call which described the scene as a gun fight. Mr. Spring was arrested and he was later charged with second degree assault. A jury trial was held on August 17 and 18, 1993. Mr. Spring proceeded pro se. Throughout trial, Mr. Spring claimed he was making a citizen's arrest of Mr. Fichtler because of the incident in Montana. Prior to closing arguments, the State successfully moved the court not to submit the issue of citizen's arrest to the jury. Mr. Spring then relied upon self-defense, stating that he pulled the gun on Mr. Fichtler to defend himself and Ms. McKinney from Mr. Burley. Therefore, the trial court instructed the jury on self-defense but not citizen's arrest. The jury returned a verdict finding Mr. Spring guilty of

second degree assault. Mr. Spring appeals pro se, apparently raising 11 issues.[2]

DISCUSSION

Mr. Spring contends that his Fourth Amendment rights were violated when Deputy Glen Ball opened Mr. Spring's locked car and found a .357 revolver. Deputy Ball testified that Mr. Spring gave him permission to search his vehicle. "A search conducted pursuant to consent is proper. even absent a warrant." State v. Hastings, 119 Wn.2d 229, 234, 830 P.2d 658 (1992). Mr. Spring has not alleged that his consent was involuntary or that the search exceeded the scope of his consent. Hastings, 119 Wn.2d at 234. Accordingly, Deputy Ball's search of Mr. Spring's car was lawful.

Mr. Spring contends he was arrested for aiming a weapon at a person but was prosecuted for assault. A prosecutor does not violate equal protection "when the crimes the prosecutor has the discretion to charge require proof of different elemements." In re Taylor, 105 Wn.2d 67, 68, 711 P.2d 345 (1985). Deputy Paul McKenzie testified that he advised Mr. Spring he was citing him for second degree assault. The prosecutor had discretion to charge Mr. Spring with a crime the elements of which could be proved. It was not error to charge and prosecute Mr. Spring for second degree assault.

Mr. Spring contends the trial court erred by denying his motion for change of venue due to pretrial publicity. Accordingly, he was denied a fair trial. A motion for change of venue in a criminal case is directed to the sound discretion of the trial court. State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984), overruled on other grounds bu State v. Brown, 111 Wn.2d 124, 761 P.7d 588 (1988). The trial court's decision "will not be disturbed on appeal, absent a convincing showing of an abuse of discretion." State v. Malone, 75 Wn.2d 612, 614. 452 P.2d 963 (1969). Mr. Spring bases this contention on a March 11, 1993 newspaper story and the "biased" nature of Ritzville. He failed to show how the trial court abused its discretion.

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[2] This court will address Mr. Spring's assignments of error even though they were not raised at trial and do not concern a manifest error affecting a constitutional right and are not supported by legal authority. RAP 2.5(a); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). For this reason alone the appeal lacks procedural merit. However, the following discussion reveals there is no substantive basis for Mr. Spring's appeal.

Further, a defendant's due process rights are not violated merely by the existence of pretrial publicity. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). Rather these rights are violated "where pretrial publicity prejudices the defendant's right to an impartial jury." Laureano, 101 Wn.2d at 756. If the defendant can show an apparent probability of prejudice to his right to an impartial jury, then the defendant's motion for change of venue must be granted. State v. Gilcrist, 91 Wn.2d 603,609,590 P.2d 809 (1979). Mr. Spring has failed to show a probability of prejudice to his right to an impartial jury. Accordingly, the trial court did not err by denying Mr. Spring's motion for change of venue.

Mr. Spring next contends he was denied an impartial jury because when he arrived at court. he found "a seated jury that was compiled of relatives and friends of Prosecutor Dennis Morgan and Judge Miller." He also contends he was only allowed four challenges. A defendant has a right to be tried by an impartial jury but does not have the right to be tried by a particular juror or jury. State v. Gentry, 125 Wn.2d 570. 614. 888 P.2d 1105. cert. denied, 116 S. Ct. 131 (1995). Mr. Spring was present when the venire was sworn. He was also present when the trial judge and prosecutor questioned potential jurors. Mr. Spring also questioned potential jurors. Moreover, Mr. Spring exercised his six peremptory challenges and his peremptory challenge for the alternate juror. Finally, Mr. Spring stated that the jury conformed to his notes. Mr. Spring was not denied an impartial jury.

Mr. Spring, contends the trial judge was biased against him and he should have had a different judge. He claims that the trial judge improperly denied his motion for change of venue and improperly seated a partial jury. Recusal lies within the sound discretion of the trial court. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995). As already discussed, the trial court did not deny Mr. Spring an impartial jury and properly denied Mr. Spring's motion for change of venue. The record contains numerous instances where the trial court allowed Mr. Spring great leeway with his questioning of witnesses.

Mr. Spring contends the prosecutor ignored false testimony by Mr. Fichtler and Mr. Burley. Mr. Spring has not supported this allegation. Mr. Fichtler's and Mr. Burley's testimony was consistent with statements they made to both Idaho and Washington police officers. There is no evidence that Mr. Fichtler or Mr. Burley gave false testimony. There is also no evidence that if they did give false testimony the prosecutor was aware of it. Further, witness credibility is an issue for the jury. State v. Buss, 76 Wn.

App. 780, 788, 887 P.2d 920 (1995). Accordingly, the prosecutor did not suborn perjury.

Mr. Spring contends the State prompted Deputy Ball to deny making the statement that the 911 call was "truly bungled." The record does not contain any indication that the State prompted Deputy Ball to deny making this statement. When Mr. Spring asked Deputy Ball whether he made the statement, Deputy Ball responded, "No, sir. I'm sure I did not say that." The record does not contain an objection from Mr. Spring indicating that the prosecutor was acting improperly at the time. Accordingly, this error is without a factual basis.

Mr. Spring assigns two errors with respect to the 911 recording. First, he contends that prior to trial someone tampered with the 911 recording. Second, he contends that it was error not to have the 911 recording transcribed into the record.

At the State's request, the 911 recording was played with the jury present. Mr. Spring did not object and actually requested that a portion of the recording be played again. Mr. Morgan did not object and that portion was played for the jury. Mr. Spring then requested that the rest of the recording be played. Again, Mr. Morgan did not object and the remaining portion of the 911 recording was played. Mr. Spring never asserted that the 911 recording had been altered. There is no support for Mr. Spring's contention that someone had tampered with the 911 recording.

Mr. Spring also contends that it was error not to transcribe the 911 recording into the trial record. He does not indicate how this has prejudiced him. Apparently, Mr. Spring believes that the 911 recording, which alludes to a "gun fight," demonstrates that the subsequent police action was improper. In other words, based on the 911 call he was wrongfully arrested. He contends that he wanted someone to call 911 because he was making a citizen's arrest, yet the call made it appear that Mr. Spring was the offender. Even if these facts could be gleaned from a transcript of the 911 call, Mr. Spring has not shown what effect this would have had on his trial or on review by this court.

Mr. Spring next contends that the trial court erred by excluding evidence of his character. Prior to trial, Mr. Spring told the judge he wanted to be able to tell his life story. The trial judge informed Mr. Spring that he would allow him to provide a brief sketch of his life but that his character was not at issue and therefore was not relevant. Throughout trial, including opening and closing statements, Mr. Spring brought up his character. It was not error for the trial court to exclude evidence of Mr. Spring's character. His character was not an essential element of his self-

defense claim; therefore it was not relevant. State v. Kelly, 102 Wn.2d 188, 197, 685 P.2d 564 (1984).

Finally, Mr. Spring contends he was not properly advised of Miranda warnings when he was questioned at Jake's Cafe and the police did not administer these warnings until he was at the police station. Mr. Spring does not allege what statements were introduced at trial that were made prior to being advised of the warnings. Moreover. once Mr. Spring was advised of the Miranda warnings, he made a voluntary statement to Deputy Ball which he had Deputy Ball read at trial. Accordingly, this assignment of error has no merit.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040

"S/_____"
Brown, J.

WE CONCUR:

"S/_____"
Sweeney, C.J.

"S/_____"
Kurtz, J

APPENDIX B

THE SUPREME COURT OF THE
STATE OF WASHINGTON

Filed September 3, 1997

No. 65440-9

ORDER

C/A No. 13707-4-III

STATE of WASHINGTON,
Respondent

v.

Gary Monte Spring,
Petitioner

All five members of Department II of the Court considered the matters set on its September 2, 1997, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied. The motion to accept video tapes as part of the record is denied.

I CERTIFY THAT THIS ORDER WAS
ENTERED BY THE COURT ON THIS
3rd DAY OF SEPTEMBER, 1997.

"S/_____"
C.J. Merritt, Clerk

I CERTIFY THAT THIS ORDER WAS
ENTERED BY THE COURT ON THIS
3RD DAY OF SEPTEMBER, 1997
"S/_____"
C.J. Merritt, Clerk

filed
Supreme Court
State of Washington
97 Sep-3pm 1:06
by C.J. Merritt, Clerk

APPENDIX C

PSYCHIATRIC EVALUATION

G. CHRISTIAN HARRIS. M.D. INC., P.S.
Diplomate, American Board of Psychiatry

November 17, 1993

Honorable Richard W. Miller
Judge of Adams County Superior Court
210 W. Broadway
P.O. Box 126
Ritzville, WA 99169-0126

Re: Gary M. Spring

Dear Judge Miller:

I interviewed Gary Monte Spring on 14 October, 1993 in psychiatric evaluation. I also reviewed a pre-sentence investigation submitted by Dan Hall, dated October 4, 1993.

Mr. Spring was interviewed in the presence of his fiancee Marilyn J. McKinney, although Marilyn participated only occasionally during the interview.

Mr. Spring describes a life-threatening and very frightening series of events which occurred on I-90. He was driving from Montana to Seattle at the time and these events began at the beginning of "Look out Pass" in the state of Montana.

Mr. Spring described the incidents as follows: he and his fiancee were attempting to pass a truck and noted a red car "playing games" with the truck. He moved over into the right lane, then noted another car trying to

pass the same truck in front of him. He noted this car was finally able to pass the truck when the red car, a Toyota, pulled over to the right lane. When Mr. Spring subsequently tried to pass the red Toyota it blocked his passage and then commenced to slow down, then speed up blocking Mr. Spring's passage again and again and switching from lane to lane to further ensure blocking Mr. Spring's passage. He was finally able to pass the red Toyota and barely cleared a guardrail in so doing.

In the very few seconds involved in successfully completing his pass and narrowly avoiding colliding with the guardrail he caught a glimpse of, the two individuals in the Toyota and vividly recalls them laughing. He said that as a former stockcar driver, he was able to avoid a disaster that the ordinary motorist undoubtedly couldn't have.

Mr. Spring continued down the road, distancing themselves from the red Toyota when he noted an Idaho State Police car; he stopped and informed the policeman about the events. The policeman then stopped the Toyota and questioned the occupants. He was then told by the policeman that the incident had occurred in Montana and that the situation was really a "wash" - his advice was that the two vehicles and their occupants stay away from one another. At the time the policeman was talking with them he was aware of Mr. Spring's having a gun and permit.

Mr. Spring and his fiancee proceeded along the road and stopped in Ritzville at Jake's cafe. He describes talking with the waitress and a trucker inside the restaurant about the incidents above. He later recognized the driver of the Toyota in the restaurant, his fiancee recognizing the driver's partner at the same time. Despite his fiancee's attempts to restrain him, he got up and encountered the two occupants of the red Toyota in the parking lot, noting that the Toyota was parked right by Mr. Spring's rather distinctive Cadillac adorned with Shriner emblems, etc.

He went up to the Toyota with the intent of talking with the occupants and confronted the driver, saying that they were the ones who had tried to kill them in Montana. The driver said something about how it was Mr. Spring's word against his and exited his car. As he did so Mr. Spring held Mr. Fichtler's arm and told Fichtler he should strike him. Marilyn got between them and Mr. Spring reflected to me that he had no intention of punching Fichtler since he knows a bit about law and realizes this would be an assault and he further would never have done so because of his own

rather significant medical problems subsequent to asbestosis. Instead Mr. Spring invited Fichtler to go with him to the State Patrol.

At about this point in these verbal and nonverbal interactions Mr. Fichtler's passenger exited the car and advanced towards Marilyn. Because of this Mr. Spring took out his 22 handgun and announced loudly that "this is a citizen's arrest", a phrase he repeated to gathering witnesses, one of whom thereupon called 911.

Many police cars and policemen apparently convened on the scene quickly, ordering Mr. Spring to the ground, putting a knee in his back and his face in the mud, wrenching his wrists with handcuffs. Police milled around and searched the car, although no one searched the trunk. One of the policemen apologized about the bungling and "three ring circus" and told Mr. Spring he would help him "sort things out". Taken to the station, he and Marilyn were separated and each gave their individual statements. Marilyn was able to observe Mr. Fichtler and his passenger conferring at the police station as they prepared their subsequent statements.

Charged with second degree assault, Mr. Spring appeared "pro se". He had reason to expect exoneration from his own knowledge of the circumstances regarding the incident plus his past experience as a police reserve school student and a long-time intermittent association with several police persons, as well as the fact that he had previously made two citizen's arrests earlier in his lifetime. He felt that he had broken no law and that he had exercised good judgment and restraint. He did realize the possibility that he could be charged with a misdemeanor, i.e., displaying a firearm, but was confident that he was not guilty of any assault.

He was indeed found guilty and at sentencing the court requested a psychiatric evaluation.

This man indeed did seem to exercise reasonably normal judgment in the face of what he perceived to be the righteous confrontation regarding an assault by vehicle of both him and his fiancee. His perceptions of his own danger at the time of the driving incident seem clear and detailed, and his interpretation of these events seems reasonable particularly considering his background in stock-car racing.

He similarly exercised good judgment and was quite aware of the consequences when he was involved in the confrontation in the parking lot

(please see above). He sensed a danger or assault when Fichtler's passenger exited the car and advanced towards his fiancee and at that point displayed his weapon for which he has a permit, feeling that this indeed was self-defense.

For all these reasons, this individual is thought to be a candidate for a mitigated sentence. Because of the emotional nature of the interactions at the time in question, his capacity to fully appreciate the possible perception of wrongfulness regarding his conduct and to know that such conduct may not be perceived or interpreted as conforming to the requirements of the law was significantly impaired.

I would like to comment on my review of the pre-sentence investigation. I obviously did not have the opportunity of interviewing Mr. Fichtler and realize that interviewing the two men might well result in a he said - he said type of rehash. Nonetheless I think it highly unlikely that Mr. Spring, an experienced stock-car racing driver, would be driving erratically or trying to run anyone off the road. I note also that Mr. Spring sought police help by talking with the Idaho State Patrol person and find myself asking why he would do this unless he felt he was the victim in this set of circumstances, not the perpetrator. Apparently the policeman was persuaded enough that he pulled Mr. Fichtler over to address Mr. Spring's complaint. It was Fichtler who must have seen Mr. Spring's car parked at Jake's cafe and completed disregarded the Idaho State Patrolman's instructions that the two of them avoid each other, since it was Mr. Fichtler who pulled in next to Mr. Spring's already parked-Cadillac. It is difficult to know the impact of the pre-sentence investigator's evaluation of Fichtler's claims based on his having been a "mental health professional in Adams County for 15 years" and Fichtler's subsequent diagnoses about Mr. Spring's self control issues or judgment issues or his lack of consideration of the consequences of his actions. I furthermore don't know how the pre sentence investigator factored in Mr. Fichtler's allegations that these alleged "symptoms" reflect a personality disorder. Certainly, my mental health evaluation indicates none of these characteristics in Mr. Spring and he does not need an anger management program.

Mr. Spring was treated several years ago for a Major Depression. He was treated with brief hospitalization and a depressant medication and psychotherapy by Bryce MacMurray, a local psychiatrist here in Seattle. He responded well to treatment. At the present time, I believe this man has some degree of emotional fragility in that he feels very wronged by a

system he has been loyal to throughout his life. I am concerned that a rigid sentencing procedure not taking the above history into account will revictimize this person. The most obvious area of poor judgment on Mr. Spring's part was not to hire an attorney to represent him in his trial.

Thank you very much for asking me to see Mr. Spring. Please call should you have any further questions.

Sincerely,

"S/_____"
G. Christian Harris, M.D.

GCH:s